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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 291

WILLIAM F. HERRON, *Petitioner,*

vs.

THE STATE BAR OF CALIFORNIA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California.

WILLIAM F. HERRON,
645 Mills Building, San Francisco 4, California,
Petitioner in Propria Persona.

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of William F. Herron for a writ of certiorari to the Supreme Court of the State of California, respectfully shows to Your Honors:

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

In the year 1927 the legislature of the State of California passed a statute known as the State Bar Act, which was later codified under the title of Division III of the Business and Professions Code. The portions of the statute material to the consideration of the question here presented are annexed to this petition as Appendix B. They may be summarized as follows:

Every attorney practicing law in the State of California is made a member of the State Bar of California, which is described as a public corporation. He is compelled by the Act to pay dues to this corporation, whose corporate powers are exercised by a board of governors consisting of 15 members chosen from different districts throughout the State. The board of governors is empowered to fix the amount of these dues up to $10 per annum. If these dues are not paid within a certain period of time, a penalty is added for their nonpayment. The board of governors is empowered to fix the amount of this penalty, the only limitation being that it must not exceed double the amount of the dues. If the dues and penalties are not paid, he is suspended from practice until they are paid.

The money received by the corporation from the members of the bar who are compelled to be members of the organization becomes the property of the corporation. (See Section 6144, Appendix B.)

The Act gives the board of governors plenary power to expend the funds as they see fit. They are not required to account to the membership of the so-called corporation for their expenditures. No provision is made by which the members of the board can be removed or called to account even for the grossest malfeasance or corruption. Neither the Supreme Court nor any other court of the State of California has any authority over the board of governors. There is, indeed, a provision of the Act (Section 6145) that the board shall certify annually to the Chief Justice of the Supreme Court a statement showing **the total amount of receipts and expenditures** for the 12 months preceding. This procedure, however, is a mere gesture, because the statement is not required to be itemized, and the Chief Justice is given no power either to approve or disapprove the statement, and no provision is made for the filing of any exceptions to the account. In other words, the board of governors may expend the funds of the organization in any manner that they deem necessary to carry out the purposes of the Act without accounting for the funds of which they are the trustees. They are clothed with absolute immunity; they are answerable to no earthly power.

In Appendix B the sections of the Act relative to disciplinary proceedings are set forth. The State Bar is empowered without the filing of any complaint, under oath or otherwise, to initiate proceedings against any member of the profession looking toward his disbarment, suspension or other disci-

pline. These proceedings may have their origin in statements in the public press, public rumor, idle gossip, or anonymous letters or telephone calls. Section 6044 specifically provides as much because it confers upon the board or any other local administrative committee the right to initiate and conduct investigations of all matters affecting the practice of law or the discipline of lawyers without the filing or presentation of any complaint. The State Bar is both prosecutor and judge. This rule places every member of the profession at the mercy of any person who dares not or will not come forward publicly or present his accusation under oath, but who whispers his accusation to some official or employee of the organization. The accused is then summoned before what is known as a pre-investigating committee without even being informed of the nature of the accusation against him or the name of his accuser. If the investigating committee decides that formal proceedings are justified, the matter is then referred to another administrative committee which hears evidence under oath, and the accused attorney is entitled to appear and defend in person or by counsel, though the committee may admit or exclude any evidence that it sees fit, and in none of the cases passed upon by the Supreme Court of California has the Supreme Court reversed a recommendation of the board of governors for the improper admission or exclusion of evidence.

If the administrative committee makes a recommendation for disbarment, suspension or other disci-

pline, a transcript of the proceedings is sent to the board of governors, which may either adopt, diminish or increase the penalty. The language of the Act is that the board may "recommend" disbarment, suspension or other discipline, but this act of the board is more than a mere recommendation. It has the effect of a final judgment unless within 60 days after the recommendation is filed in the Supreme Court the accused lawyer presents a petition to that Court to review and reverse the action of the board. (Section 6084, Appendix B, page 34.) The Supreme Court of California has construed this provision of the act to mean that the court is powerless to do anything else than order the disbarment or suspension of the attorney if no such petition is filed.

It was so held by a majority of the court in the case of

In re McKenna, 16 Cal. (2d) 610, 107 Pac. (2d) 258,

though Justice Carter, in a powerful dissenting opinion says:

> "I cannot yield to this suggestion of impotency on the part of this court, and I refuse to allow myself to become a rubber stamp and give my approval to a recommendation or decision which is not only shocking to my sense of justice, but constitutes an encroachment upon the judicial power vested in this court by the constitution of California."

Your petitioner, who is 58 years of age, and who was admitted to practice law in California on Oc-

tober 5, 1909, eighteen years prior to the enactment of the statute, was proceeded against by the State Bar of California on a charge that he practiced law while under suspension for the nonpayment of the dues and penalties fixed by the board of governors in that he filed an action at law in the Superior Court of Marin County. He appeared before the investigating committee and objected to the proceedings upon the ground that the revenue provisions of the State Bar Act were invalid and repugnant to the due process of law clause in the Fourteenth Amendment to the Constitution of the United States. This objection was overruled. The administrative committee recommended that he be suspended from the practice of law for a period of 90 days, but the board of governors recommended disbarment. This recommendation was followed by the Supreme Court of California in the annexed opinion. (Appendix A.)

There were two other charges pending against petitioner, but all three were consolidated and only one opinion was rendered. As only one order was made in the three proceedings, the federal question is properly before the court. Justice Carter dissented from the judgment and decree of disbarment, and filed a dissenting opinion which is printed in Appendix A. Thereafter, and on May 3, 1944, the Supreme Court of California denied a petition for a rehearing, with Justice Carter again dissenting. On the same day Justice Carter, pursuant to the provisions of Section 350, Title 28 U. S. C. A., signed an order staying the execution and enforcement of the judgment and de-

cree for a period of three months to enable petitioner to apply for and obtain a writ of certiorari from this Court.

The question to be determined by this Honorable Court is whether an attorney at law admitted to practice in all the courts of the State can be deprived of his right to engage in his chosen vocation because of his failure to comply with the provisions of a statute which requires him to pay, **not a tax imposed by the State for the purpose of raising revenue, or a license imposed for the purpose of regulation and revenue, but a tribute to a corporation which is permitted to retain all moneys paid by members of the profession pursuant to the provisions of the Act without accounting for them, which funds become the permanent property of the corporation.** Under the rule that the test of constitutionality is "not be what has been done under it, but what may by its authority be done"

(*Roller v. Holly,* 176 U. S. 398, 20 S. Ct. 410, 44 L. Ed. 520;

Bennett v. Davis, 90 Me. 102, 37 Atl. 864;

Stuart v. Palmer, 74 N. Y. 188;

Dewell v. Commissioners, 232 Ill. 215, 83 N. E. 809;

In re Grout, 105 App. Div. 98, 93 N. Y. S. 711;

In re Lambert, 134 Cal. 626, 66 Pac. 815),

the State Bar Act should be held unconstitutional by reason of the possibility that the imposition of the dues would result in the enrichment of the corporation, and the placing in the hands of the individuals

who compose its board of governors the control of the funds so accumulated. But this possibility has ripened into an actuality. The State Bar of California issues a publication known as The Journal of the State Bar of California. In the issue of this publication for January and February 1944, a copy of which is transmitted with the record to this Honorable Court for its inspection, there appears at page 17 a statement of the income and expenses of the organization for the year ending December 31, 1943. This statement shows total receipts from dues, after deducting refunds made to members of the Bar serving in the Armed Forces of the United States, of $109,986, and total receipts of $136,051.43. After payment of all expenses there remains in the treasury of the State Bar $67,233.82 in cash and $10,000 in United States War Bonds, or a total of $77,233.82. This sum of money under the provisions of the statute is the property of the State Bar, which the board of governors may expend without let or hindrance, in any manner that they see fit. That they have not and will not hesitate to spend it for objects utterly foreign to the regulation of the practice of law, which, as we shall presently show, is the sole purpose for which a valid license fee could be imposed, is revealed by the fact that during the year 1943 the sum of $11,796.25 was expended for so-called war work and public relations, and $2515.96 was expended for the committee on the administration of justice whose functions are to maintain a lobby at the State Legislature. On page 14 of the same publication it appears

that the board of governors made certain appropriations for the year 1944. Passing by all items that might by some peradventure be regarded as legitimate expenditures, we find (page 16) that the sum of $9000 is appropriated to engage the firm of Lee & Losh as public relations counsel for the Bar. What possible necessity there could be for paying a gratuity to a favored firm of public relations counsel as a means of regulating the practice of law beggars the comprehension. It is, of course, an absolute misappropriation of the funds of the Bar, but under the statute there is no remedy in the courts or elsewhere.

To recapitulate, **it is the contention of petitioner that the act takes private property for a private use, and that such taking is a deprivation of property without due process of law within the meaning of the Fourteenth Amendment.**

STATEMENT PARTICULARLY DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

(A) The statutory provision believed to sustain the jurisdiction is Section 344, Subdivision B, Title 28 U. S. C. A.

(B) The date of the judgment of the State Court sought to be reviewed was April 3, 1944, but by the terms of the judgment itself it was not to become effective for 30 days thereafter. On May 3, 1944, the State Court denied a rehearing and this last date

was the date on which the original judgment became effective for the purpose of review on certiorari.

(*Chicago Great Western Ry. Co. v. Basham,* 249 U. S. 164, 39 S. Ct. 213, 63 L. Ed. 534.)

(C) That the nature of the case and the rulings of the State Court were such as to bring the case within the jurisdictional provisions relied on is sufficiently set forth in the preceding summary and statement of the matter involved, and from the annexed opinion of the State Court, and repetition thereof is omitted in the interest of brevity.

(D) The cases believed to sustain the jurisdiction are in part as follows:

New York v. Connelly, 7 Wall. 16, 19 L. Ed. 57;

Millsaps College v. City of Jackson, 275 U. S. 129, 48 S. Ct. 94, 72 L. Ed. 196;

Chesebro v. La. County Flood Control District, 306 U. S. 459, 59 S. Ct. 622, 83 L. Ed. 921;

Senior v. Braden, 295 U. S. 422, 55 S. Ct. 800, 79 L. Ed. 1520;

Seabury v. Green, 294 U. S. 165, 55 S. Ct. 373, 79 L. Ed. 834;

Minn. v. Nat. Tea Co., 309 U. S. 551, 60 S. Ct. 676, 84 L. Ed. 920;

American Express Co. v. Michigan, 177 U. S. 404, 20 S. Ct. 695, 24 L. Ed. 823.

STATEMENT OF THE GROUNDS UPON WHICH IT IS CONTENDED THE QUESTIONS INVOLVED ARE SUBSTANTIAL.

1. The right to practice law, like the right to pursue any other lawful profession, occupation or calling, is a valuable property right upon which no state can impose onerous or unreasonable burdens and of which no one can be deprived without due process of law. The right of an attorney to appear and argue cases acquired by his admission is not a mere indulgence, revocable at the pleasure of the court, or by an enactment of the legislature. His admission to practice is a judicial determination that he possesses the necessary qualifications of legal learning and good moral character. His right to practice is a right of which he can only be deprived for moral or professional delinquency and by a judgment of the court.

Ex parte Garland, 71 U. S. 333, 18 L. Ed. 366.

In his celebrated opinion in

Ex parte Wall, 107 U. S. 265, 2 S. Ct. 569, 27 L. Ed. 552,

Justice Field says:

> "But the possession of the power being conceded, and its exercise being discretionary, there is in the hands of an unscrupulous, vindictive or passionate judge, means of oppression and cruelty which should not be allowed in any free government. To disbar an attorney, is to inflict upon him a punishment of the severest character. He is admitted to the bar only after years of study. The profession may be to him the source of great emolument. If possessed of fair learning and ability, he may reasonably expect to receive from his practice an income of several thousand

> dollars a year; equal to that derived from a capital of one or more hundred thousand dollars. To disbar him having such a practice is equivalent to depriving him of this capital. It would often entail poverty upon himself and destitution upon his family. Surely, the tremendous power of inflicting such a punishment should never be permitted to be exercised, unless absolutely necessary to protect the court and the public from one shown by the clearest legal proof to be unfit to be a member of an honorable profession."

The Supreme Court of California in recent decisions has recognized the rule that in proceedings to revoke or suspend a license to practice a profession the accused is entitled to a judicial hearing, "because the person whose license had been revoked or suspended by the action of the board would otherwise **be deprived of a property right without due process of law,** as guaranteed by both the federal and the state constitutions".

Laisne v. California State Board of Optometry, 19 Cal. (2d) 831, 834, 123 Pac. (2d) 457;

Drummey v. State Board of Funeral Directors, 13 Cal. (2d) 75, 87 Pac. (2d) 848;

Dare v. Board of Medical Examiners, 21 Cal. (2d) 790.

These decisions follow the earlier California cases of

Hewitt v. State Board of Medical Examiners, 148 Cal. 590, and

Suckow v. Alderson, 182 Cal. 247,

both of which hold that the right to practice any profession is **"a valuable property right,** in which, under

the constitution and laws of the State, one is entitled to be protected and secured."

It is submitted that no attorney can be deprived of the right to practice his profession because of his failure to pay dues into the treasury of a corporation which is in its workings in all particulars similar to a private lodge, order or association.

2. The legislature has no constitutional power to impose such a restriction on the right to practice law. True, the legislature in the exercise of its power to tax may levy an occupational tax upon lawyers. That question is not involved here because the State Bar dues are not a tax. They are not levied for a public purpose. They are not paid into the treasury of the State of California. The dues are not a license because they are not imposed solely for the purpose of regulating the legal profession, or for the purpose of regulation and revenue. They may be spent, as heretofore stated, for any purpose that the board of governors sees fit, and they become the property of the corporation. It is elementary hornbook law that state legislatures have no authority to authorize taxation in aid of private enterprises or objects, even where there is no express constitutional prohibition, and taxation is unauthorized to take private property if it is not for public use, even though the public may be incidentally benefited.

Citizens Savings Assn. v. Topeka, Fed. Cas. No. 2734;

Loan Assn. v. Topeka, 87 U. S. 655;

Kelly v. Pittsburgh, 104 U. S. 78, 26 L. Ed. 658;

Dodge v. Mission Township, 107 Fed. 827, 46 C. C. A. 661, 54 L. R. A. 242;

Sutherland-Innes Co. v. Evart, 86 Fed. 597, 30 C. C. A. 305;

Cole v. LaGrange, 19 Fed. 871, affirmed 5 S. Ct. 416, 113 U. S. 1, 28 L. Ed. 896;

St. Paul Trust and Savings Bank v. American Clearing Co., 291 Fed. 212;

City of Los Angeles v. Lewis, 175 Cal. 777, 167 Pac. 390;

Briggs v. Raleigh, 195 N. C. 223, 141 S. E. 597;

Union Ice Co. v. Ruston, 135 La. 898, 66 So. 262;

Baldwin v. Fuller, 39 N. J. L. 576,

"Taxation, by the very meaning of the term, implies the raising of money for public use, and excludes the raising if for private objects and purposes."

Allen v. Inhabitants of Jay, 60 Me. 124;

McClelland v. State, 37 N.E. 1089,

"A republican form of government forbids the raising of taxes for any but public purposes, and Article Fourth, Section 4 of the Constitution of the United States" (the state) "is forever bound to maintain such form of government, and cannot assert legislative power inconsistent with it. . . . Moreover, fundamental rights existing under and protected by our constitution are further protected by the Fourteenth Amendment which voids

any act of state legislation in denial of the fundamental law of the land."

Beach v. Bradstreet, 85 Conn. 344, 349, 82 Atl. 1032.

A great jurist who was and still is the outstanding authority on the law of taxation, says:

> **"It is implied in all definitions of taxation that taxes can be levied for public purposes only.** Differences of opinion frequently arise concerning the power to impose taxation in particular cases, but all writers who treat the subject theoretically and all jurists agree on the fundamental requirement that the purpose shall be public, and they differ, when they differ at all, upon the question whether the particular purpose proposed is within the requirement."
>
> I *Cooley on Taxation* (3d Ed.), p. 181.

3. Moreover, the taxing power resides in the legistive branch of the government exclusively, and may not be delegated by the legislature to private administrative agencies or corporations, or to any individual, officer, board or commission.

Parks v. Board of Commissioners, 61 Fed. 436;
Tarpey v. McClure, 190 Cal. 593, 213 Pac. 983;
Smith v. Farrelly, 52 Cal. 77;
Houghton v. Austin, 47 Cal. 646.

The act in question is obnoxious to the fundamental principle, well stated in *Parks v. Board of Commissioners,* supra, that "the power to tax must be limited to the necessities for the purposes of government, and

the agencies for local taxation should be fixed and their powers limited by organic law, and they should be so selected as to be directly answerable for their official acts to their local constituencies or districts to be taxed."

As previously shown, the members of the board of governors of the State Bar of California are answerable neither directly nor indirectly to those who are forced to contribute to its support, and they are subject to removal neither by the membership of the Bar nor by any court. This is a patent taking of property without due process of law.

4. The provisions of the State Bar Act requiring the payment of dues cannot be upheld as a license fee for the regulation of the legal profession because the expenditure of the funds is not limited to regulatory purposes. The funds may be expended for personal or political objects; they have been expended for legislative lobbying and the employment of so-called public relations counsel, who render no conceivable service of any value. It is submitted, moreover, that the legislature has no power to regulate the legal profession, that matter resting entirely with the judicial branch of the state government. The legislature may, indeed, prescribe qualifications for admission to the bar; it may limit the pursuit of the occupation of a lawyer to persons who have been found to possess a prescribed degree of knowledge or skill, and to enact reasonable regulations to protect the public against the evils which may result from incapacity or ignorance. But once admitted to practice, an attorney holds his office for life, or during good behavior; he can only be

deprived of his right to practice by the judgment of a court after a full and fair hearing and upon clear and convincing proof that he no longer possesses that degree of integrity requisite to entitle him to practice an honorable profession. He cannot be deprived of his right to practice for nonpayment of dues to a corporation or association, as that has no bearing upon his moral character or professional qualifications. It must also be observed that the legislative power to regulate, suppress or prohibit an occupation is limited to those occupations which are or which may become, dangerous or detrimental to the public. This principle has been recognized by the Supreme Court of California in

City of Sonora v. Curtin, 137 Cal. 583, 70 Pac. 674,

in which Justice Cooper uses the following language:

> "A police regulation or restraint is for the purpose of preventing damage to the public or to third persons. There are certain lines of business and certain occupations which require police regulation because of their peculiar character, in order that harm may not come to the public or that the threatened danger may be averted. **Where the profession or business is not dangerous to the public, either directly or indirectly, it cannot be subjected to any police regulation whatever which does not fall within the power of taxation for revenue.**
>
> If the board in this case had the power to issue the license as a police regulation, it would have the power to prohibit the defendant from practicing law without the license. **There is nothing about the practice of the profession of the law which makes the business dangerous to the public.**

> **It does not threaten the public health or safety, nor is it demoralizing to the public.** It is one of the most honorable and learned professions, and its members are among the most conservative citizens in any community."

We, accordingly, submit that the questions involved are substantial questions.

THE STAGE OF THE PROCEEDINGS AND THE MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED.

The federal question was first raised at the preliminary investigation before a committee of the State Bar which instigated the proceedings, The objections made on that occasion are not part of the record because the State Bar has refused to furnish a copy of the record of those proceedings or even to allow the reporter's notes of the same to be read to your petitioner. Respondent cannot complain of the lack of a record which has been suppressed by its own arbitrary and high-handed act, for which petitioner is in nowise to blame. (See affidavit of Petitioner, Typewritten Transcript of Record, page 27.)

It was also raised in the Supplemental Brief of Petitioner (Trans. page 14, *et seq.*), and was considered and passed upon by the State Court.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

The State Court has decided a federal question of substance not heretofore specifically determined by this court, in a manner not in accord with the ap-

plicable decisions of this court, for the reasons heretofore stated under the heading of the grounds upon which it is contended that the questions involved are substantial. Restatement of what we said under that heading is omitted in the interest of brevity.

The question is of vast importance to the legal profession and to every independent and self-respecting lawyer, not only in the State of California, but in other states, such as Nevada, Washington and Oklahoma, which have enacted similar statutes designed to regiment and Hitlerize the bar, and place an honored calling under the control of commissars instead of courts.

It has not heretofore been determined by this court. We submit that it should be determined.

In view of the authorities heretofore presented, we deem a supporting brief unnecessary to the consideration of this petition, and forbear its presentation in the interest of brevity.

Wherefore, your petitioner respectfully prays that this petition for a writ of certiorari to the Supreme Court of the State of California be granted, and that the judgment and decree of the State Court be reversed.

Dated, San Francisco, California,
July 24, 1944.

WILLIAM F. HERRON,
Petitioner in Propria Persona.

CERTIFICATE.

I hereby certify that I have been duly admitted to practice law in the State of California since October 15, 1909; that I am a member of the bar of the United States District Courts for the Northern and Southern Districts of California and of the Western District of Washington, and of the United States Circuit Court of Appeals for the Ninth Circuit, and that I have not been admitted to the bar of this court for the reason that I have never been in the District of Columbia, but that I have briefed numerous cases in this court; that I have no counsel, and am unable to employ any; that in my judgment the foregoing petition is well founded in law as well as in fact, and that said petition is not interposed for delay.

Dated, San Francisco, California,
July 24, 1944.

WILLIAM F. HERRON.

(Appendices A and B Follow.)